IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Civil Revision No. 91 of 2003

Anurudh Singh …… Petitioner.

Versus

A.D.J. and other …….. Respondents.

Date of decision: 30, November 2004

For the approval of:

Hon'ble Mr. Justice P.C. Pant.

- Whether the order/judgment should be sent to the reporters for reporting? (Yes)
- Whether the reports be allowed to see the Judgment? (Yes)

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

CIVIL REVISION NO. 91 OF 2003

**Anirudh Singh Katoch, S/o Late Shri Bal Dev Singh Katoch,
R/o Bisht Estate, Nainital.**

……. Revisionist.

Versus

1. Additional District Judge/F.T.C.-I, Nainital.
**2. Smt. Lata Chauhan, W/o Late Shri P.S. Chauhan
R/o 1-Southern Anvenue, Maharani Bagh, New Delhi.**

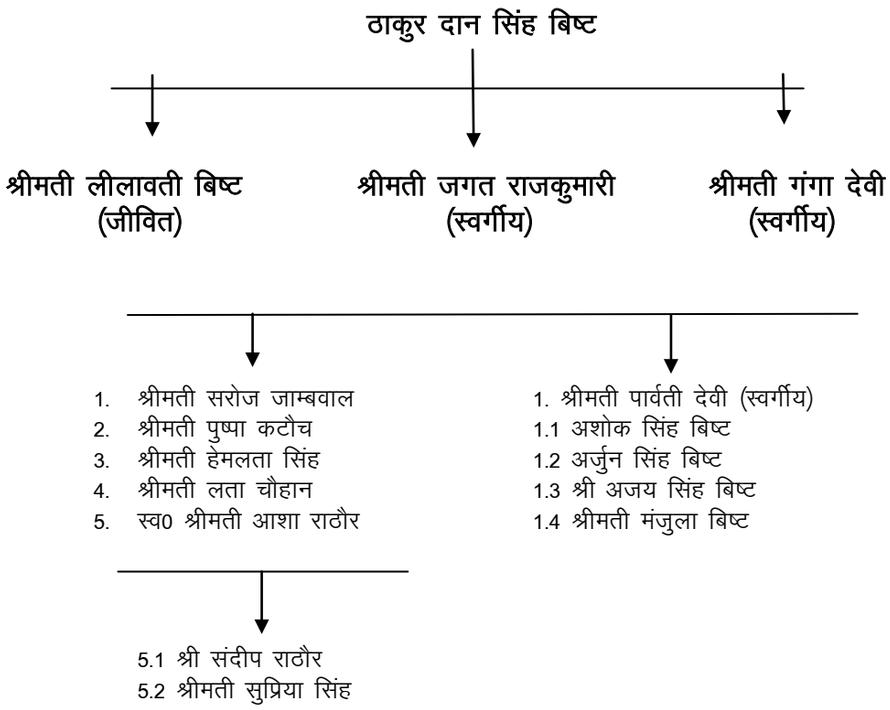
…… Respondents.

Sri M.S. Pal, learned counsel for the intervener.
Sri Arvind Vashishtha, learned counsel for the revisionist.
Sri Anurag Bisaria, learned counsel for the respondent No.2.

Hon'ble Prafulla C. Pant, J.

1. This application for revision has been filed under Section 115 of Code of Civil Procedure, 1908, and is directed against the order dated 1.11.2003 passed by respondent No.1 in Misc. Case No. 12/2003, whereby the application under Order IX Rule 13 of Code, moved by respondent no.2 is allowed.

2. Brief facts of the case are that a petition under Section 73 read with Section 74 of Indian Trust Act, 1882, was moved by the revisionist before the Civil Court at Nainital which was registered as Civil Suit No. 2 of 2001. As per the plaint allegations Late Thakur Shri Dan Singh Bist created a Trust in his life time and got it registered on 30th March 1963. During his life time he was the sole trustee and he died on 10.09.1964 in Calcutta. On his death, he left behind him three widows namely Smt. Leelawati Bist (still alive), Smt. Jagat Rajkumari (now dead) and Smt. Ganga Devi (now dead). The pedigree is shown below:



It appears that after the notices were issued to the concerned parties, the application moved under the Indian Trust Act, 1882, was allowed ex-parte whereby in place of the deceased wives of the original trustee, Sri I.S. Rathore and Ashok Singh Bist were appointed trustees vide order dated 23.12.2002 passed by the learned Trial Court. From copy of the order dated 27.3.2003 passed in writ petition no. 57 of 2003, it appears that later Smt. Lata Chauhan filed a writ petition which was disposed of with the observations that the petitioner may seek her remedy under the provisions of Code of Civil Procedure, 1908 (hereinafter for brevity Code). Thereafter she filed an application under Order IX Rule 13 of the Code before lower Court which was allowed vide impugned order dated 1.11.2003. Aggrieved by which this revision has been preferred by the original plaintiff.

3. Heard learned counsel for the parties and that of intervener, and perused the record.

4. Learned counsel for the respondent No.2 raised preliminary objection that the revision is not maintainable as the case stands open and not decided by the impugned order. In this connection he relied on the principle of law laid down in ***Shiv Shakti Coop. Housing Soceity Vs. Swaraj Developers (2003) 6 Supreme Court Cases 659.*** I have gone through the said case law and the provision of 115 of the Code. I found nothing on the basis of which if revision against the impugned order can be said to be not maintainable. Had an application under Order IX Rule 13 of the Code been rejected it would have amounted the case decided. As such finality would have arrived at. Therefore the proviso added to Section 115 as amended vide Code of Civil Procedure (amendment) Act 1999 (w.e.f. 1.7.2002), does not bar the present revision.

5. The first question for consideration before this court is whether a third party can maintain an application under Order IX Rule 13 of the Code or not. Perusal of the provisions contained in Rule 13 of the Order IX of the Code shows that it is only the defendant who can seek to set aside the decree passed ex-parte. Rather, only the defendant against whom the ex-parte decree passed, can maintain it. From the record it is very clear that Smt. Lata Chauhan (respondent no. 2) was not a party to the suit. Copy of the petition under Section 73 read with Section 74 of Indian Trust Act, 1882 moved by the Anirudh Singh Katoch (Present revisionists) shows that there were only four defendants/opp. Party in the case, namely 1. Thakur Dan Singh Trust through its Chairman Sri Ashok Singh Bist. 2. Smt. Leelawati Bist widow late Sri

Thakur Das Singh Bist. 3. Smt. Neelam Parihar, and 4. Sri Ashok Singh Bist. Admittedly the respondent no.2 was not a defendant, However it appears from the record that notice were issued to her (as she was heir of one of beneficiary) before the suit was decided ex-parte. Assuming for a moment that respondent no.2 was the person affected by the decree and was not properly served, the only course left for her was to file a suit challenging the decree as collusive. The same view has been expressed by Hon'ble the Apex Court in ***Roop Chand Gupta Vs. Raghuvanshi AIR 1964 Supreme Court 1889.*** It is settled principle of law that a person who is neither a defendant nor against whom decree was passed, cannot maintain an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908. This view finds support from the principle of law laid down in ***Smt. Santosh Chopra Vs. Teja Singh AIR 1977 Delhi 110 and Alld. Law Journal 1979 page 24.*** It is only the defendant against whom the decree passed or his legal representative on his death are the persons who can apply for setting aside an ex-parte decree but no third party can maintain application under the Rule 13. The same view has been expressed in ***Surya Kumar Vs. District Judge, Mirzapur AIR 1991 Alld. Page 75 (at page 83 and 84).***

6. In view of the above discussion learned Trial Court has wrongly allowed the application under Order IX Rule 13 of the Code at the instance of the third party. Accordingly the impugned order dated 1.11.2003 is liable to be set aside. Therefore the revision is allowed and the order dated 01.11.2003 passed by Addl. District Judge/F.T.C.-I, Nainital is set aside with the observations that respondent No.2 may seek her remedy if she so likes, u/s 9 of Code of

Civil Procedure, 1908, challenging the judgment & decree passed in Civil Suit No. 2 of 2001.

Dated: 30th November, 2004
P. Bandhavakar

(Prafulla C. Pant)